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Nos. 03-1116 & 03-1120

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appelles below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appelle below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

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INTEREST OF AMICUS CURIAE

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all

[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely

fifty states. In 1997, U.S. beer wholesaler direct sales reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

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by counsel for the National Beer Wholesalers Association. This brief is filed with the written consent of all parties, evidence of which is submitted with this brief.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordinarily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

SUMMARY OF ARGUMENT

Intoxicating liquor is a unique product in American law. The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of intoxicating liquors are dramatically different from those related to the use of other products, whether measured by scale, severity, nature or remediability. As a consequence, government has attempted to mitigate these impacts through regulation. Indeed, intoxicating liquor has always been, and remains, one of the most heavily regulated products in the country. Localities and states have enacted a variety of restrictions on the manufacture, distribution and sale of intoxicating liquor. No other product has been the subject of one, let alone two, Constitutional Amendments: the first was the Eighteenth Amendment, which established National Prohibition and the second was the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. Then, as now, community norms and standards across the country differ widely regarding intoxicating liquors. This fact underscores the soundness of the Constitutional decision to rest regulatory authority primarily at the state and local level.

Since passage of the Twenty-first Amendment over seventy (70) years ago, this Court consistently has reaffirmed the right of states to control and regulate the production, shipment and sale of intoxicants within their borders. A review of the history of the Twenty-first Amendment, the Webb-Kenyon Act, and cases arising thereunder demonstrates that states are at liberty to regulate intoxicating liquor free from Commerce Clause limitations. In *Heald*, Respondents' entire constitutional challenge rests upon the argument that Michigan's different treatment of wineries with an in-state presence (which are subject to the State's regulatory powers) from those without such a presence (which are *not* subject to the state's regulatory powers) violates the dormant Commerce Clause. This challenge simply is not cognizable.

The *Heald* decision destroyed a keystone of the State's regulatory power: the right under the Twenty-first Amendment to control the importation of intoxicating liquor into the State and insist on importation and distribution through licensed entities with a physical presence in the State. Without apparent regard to the consequences of its decision, the *Heald* case made a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the State), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby toppled a comprehensive three-tier system governing the distribution of intoxicating liquor.

Furthermore, the broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the

American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

ARGUMENT

I. LIQUOR REGULATION PRIOR TO PROHIBITION.

Intoxicating liquor never has been treated like other products either by society or government. Over the course of our nation's history, public tolerance and the degree of regulatory control has vacillated between a view of alcohol as a mere article of commerce and a view of alcohol as a dangerous intoxicating beverage. The nineteenth century saw several waves of temperance activity with both social and political components. This activity led to greater regulation of intoxicating liquors. At times and in some parts of the country, the manufacture and sale of intoxicating liquor was banned, public dispensaries were established, and sales outlets were licensed, restricted and carefully regulated.

The evolution of our commercial infrastructure has led to legal challenges to existing liquor regulatory regimes. In the late nineteenth century, improvements in transportation, in particular the growth of railroads, and the concomitant expansive development of the dormant Commerce Clause doctrine gave rise to lawsuits which contested the constitutionality of state statutes and ultimately undermined the effectiveness of state regulatory efforts. The Court in *Bowman* and *Leisy* narrowly circumscribed the power of states to regulate the importation of intoxicating liquors. *See Bowman v. Chicago & NW Railway Co.*, 125 U.S. 465 (1888) (the Court struck down a state law which restricted the importation of intoxicating liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100 (1890) (the Court held

that intoxicating liquor shipped into the state remained an article of "interstate commerce", immune from state regulation, as long as it remained in its original package). *Bowman* and *Leisy* represent a short-lived, jurisprudential detour from the subsequently established constitutional principle that intoxicating liquor is unlike other products and is not subject to dormant Commerce Clause analysis.

The crippling of state regulation by the Court in the *Bowman* and *Leisy* decisions provoked a congressional response, ending "dormacy" of federal regulations and permitting state regulation of importation. Congress passed the Wilson Act, 27 U.S.C. § 121 (1890), declaring that, upon arrival in the state, the sale, distribution and transportation of intoxicating liquor was subject to state regulation. In *Rhodes v. Iowa*, 170 U.S. 412 (1898), however, the Court narrowly construed the Wilson Act and concluded that the dormant Commerce Clause prohibited state regulation of direct shipments to in-state consumers by out-of-state distributors. As a result, railway express began to function as retail outlets. Congress responded with the passage of the Webb-Kenyon Act, 29 U.S.C. § 122 (1913), which gave the states power to prohibit the sale, distribution, transportation or importation of intoxicating liquor into the state in violation of its laws.[2] There could not have been a clearer expression by Congress of its intent to ensure that the state be the focus of control regarding intoxicating liquor.[3] The risk of discriminatory

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[2] In vetoing the Bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." The veto was swiftly overridden. *See* 49 Cong. Rec. 4292.

[3] As originally reported by the Senate Committee, the Webb-Kenyon Act (Senate Bill 4043) included as Section 2 the explicitly anti-discriminatory language of the Wilson Act (i.e. states may not discriminate against out-of-state suppliers, importers or wholesalers with regard to the regulation of intoxicating liquor). 49 Cong. Rec. 2687. This Section was eliminated from the final Bill. Clearly, this evidences the

legislation was outweighed by the desire to insure effective state regulation. The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Ry Co.*, 242 U.S. 311 (1917).

II. PASSAGE OF THE TWENTY-FIRST AMENDMENT.

In response to a national temperance movement, the Eighteenth Amendment, establishing National Prohibition, was passed in 1919. That "noble experiment" lasted just fourteen (14) years. The Twenty-first Amendment, enacted in 1933, marked the abandonment of the effort to have a national policy prohibiting manufacture and sale of alcoholic beverages. The failure of the National Prohibition illustrated that noble motives were insufficient and, without broad support in public opinion, were ineffective and even destructive of the belief in the rule of and respect for law. Regulation of intoxicating liquor was to be undertaken at the level of government at which it was able to obtain broad support. In the future, primarily state, not national, regulation was to govern intoxicating liquors.

The ratification of the Twenty-first Amendment represented a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of intoxicating liquor control. As observed by the

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intent of Congress to grant states the power to regulate intoxicating liquors even where it may result in the possibility of differential treatment between in-state and out-of-state vendors. *See Dugan v. Bridges*, 16 F. Supp. 694 (D. N.H. 1936) ("[The Webb-Kenyon] Act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state production. *See* 49 Cong. Rec. p. 1687. In the act as finally posed the restrictive language does not appear. Its omission seems important. It shows intent to give the states an entirely free hand in regulating the importation and transportation of liquor.")

Swedenburg court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Swedenburg v. Kelly,* 358 F.3d 223, 232 (2d Cir. 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 110 (1980).

As originally proposed, Section 3 of the Twenty-first Amendment would have given Congress concurrent power to regulate sales. That section was eliminated. At the time, Senators Blaine and Wagner explained that Section 3 would have been inconsistent with Section 2.

Section 2 was to return effective regulatory power to the states. The drafters of the Twenty-first Amendment, like the drafters of the Webb-Kenyon Act, did not wish to encourage discriminatory legislation. They were, however, prepared to endure it to assure that state regulation of intoxicating liquor would not be undermined. Prior to its consideration by the House, Congressman Lea objected to Section 2 because it would protect "unwise" or "improvident" state liquor laws. 76 Cong. Rec. 2776 (House)(1933). In submitting this language to state conventions, Congress believed that the goal of ensuring effective state regulation of intoxicating liquors was paramount to the risk that states may enact laws that some may deem to be unwise or imprudent. The Twenty-first Amendment was intended to ensure that each state was endowed with the power to regulate independently intoxicating liquors in accordance with "local sentiment and local habits" *see, e.g.* 76 Cong. Rec. 4146 (1933) and to restore to the states "absolute control in effect over interstate commerce

affecting intoxicating liquors which enter the confines of the states", *see, e.g.*, Comments of Senator Blaine, 76 Cong. Rec. 4143 (1933).[4]

The purpose and effect of the Twenty-first Amendment was to free states from the limits imposed by the dormant Commerce Clause regarding the regulation of importation, distribution and sale of intoxicating liquors. While judicially created limits on state regulation over interstate commerce of other products may have made sense, the need to create a "safe harbor" for the states' enforcement authority over intoxicating liquors was primary.[5]

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[4] The Senate twice was presented with language limiting Section 2 of the proposed Twenty-first Amendment to the protection of "dry" states. The proposal twice was rejected. The first version, of what became the Twenty-first Amendment, was proposed in December, 1932, and contained a clause protecting states that prohibited the manufacture and sale of intoxicating liquor. The Senate Judiciary Committee, in its report, changed the language to that which was ultimately enacted as Section 2. The full Senate had an opportunity to reconsider the expanded scope of paragraph 2 when Senator Glass proposed that the amendment be limited to states prohibiting manufacture and sale of intoxicating liquors, with the Commerce Clause continuing to constrain alcoholic beverage legislation in states permitting such manufacture and sale. The Glass amendment was rejected. 76 Cong. Rec. 4219, 4229 (1933). This history, in great detail, was brought to the attention of the Supreme Court when it considered *Young's Market*. The Court unanimously rejected an appeal to history not because history pointed in a direction the Court did not wish to go, but because the Court considered it unnecessary and unwise. Long before, this Court had made clear that the effect of the Wilson Act was not limited to states that prohibited the manufacture and sale of intoxicating liquor. *Vance v. Vandercook*, 170 U.S. 438, 447 (1898); *Reymann Brewing Co. v. Brister*, 179 U.S. 445, 454-55 (1900); *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 29 (1905).

[5] A political scientist noted in 1934: "Those who view with apprehension the centralizing tendencies of New Deal legislation may find solace in the antithetical development in the field of liquor control. The uniform control achieved by the Eighteenth Amendment was the object of applause until its evident unworkability was discovered. It is one of the

After Repeal, "true temperance" meant sustainable moderation; effective control meant what could be enforced. Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*, at 7 (1933). The regulation of intoxicating liquor struggled to reconcile a tension caused by two contrasting images: a legitimate commodity, manufactured and sold by willing producers versus a dangerous intoxicating beverage, capable of being abused. Alcohol was to be available, but

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paradoxes of American politics that we have destroyed the possibility of centralization in the field of liquor control at the same time that we have been attempting to achieve greater centralization in a number of activities hitherto believed to be completely in the field of state authority." Dayton E. Heckman, "Contemporary State Statutes for Liquor Control," 28 Am. Poli. Sci. Rev. 628 (1934).

In 1939, then Solicitor General Robert Jackson (who was one of the primary proponents of the creation of a national market and of the dormant Commerce Clause doctrine) stated: "The Twenty-first Amendment to the Constitution, which repealed prohibition, provided that the transportation into any State of intoxicating liquors, in violation of the laws of such State, is prohibited. Thus an exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination. The purpose, and I intend no criticism of it, was to protect each State from importations that would defeat its own policy of dealing with the moral and social problems incident to the liquor traffic.

The power thus given to protect their social policy many States turned, under pressure from local liquor interests, to the protection of home industry. Local beer is given an effective tariff protection by imposing higher sales taxes on out-of-state beer, or special license fees and restrictions are placed on those who sell it. The States thus discriminated against have then responded with all of the weapons of modern tariff reprisal, such as retaliatory taxes, and inspections and partial and complete embargoes. A beer war has involved many States and perverted the purpose of the Amendment. Such legislation applied to intoxicating liquor, however, is quite properly sustained by the Supreme Court." Jackson, "Trade Barriers—A Threat to National Unity," in Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers, April 5,6,7, 1939 (Chicago).

rigidly licensed. Unrestricted trade was not tc be permitted; low prices and wide availability were rejected as categoric definitions of the public good. [6] Disparate treatment of imported and in-state intoxicating liquors was to be permitted.

III. JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT.

Section 2 of the Twenty-first Amendments provides as follows:

> The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"The Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg v. Kelly*, 358 F.3d 223, 227 (2d Cir. 2004). Moreover, this national consensus was achieved just seventy years ago. The plain language of the Amendment exclusively reserves to the states the right to regulate "transportation or importation" of intoxicating liquors. Nothing in the language of the Amendment

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[6] After passage of the Twenty-first Amendment, states, for the most part, chose to follow one of two models in order to curb increased sales, abusive sales practices, and excessive consumption: state monopoly of the distribution chain or the three-tier system. The three-tier system of distribution prevails today in a majority of states. *See Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001), vacated by *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). The three-tier system is designed to prevent vertical integration in the liquor industry by "tied houses." Direct links between manufacturers and retailers, and disproportionate influence between the two, has historically led to increased sales, abusive sales practices and excessive consumption. The three-tier system interjects checks and balances by separating producers from consumers through a distinct, mandatory, transparent and accountable distribution system. *See S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983).

limits the states' power to regulate "transportation and importation." As such, it is clear from "the scope of the Twenty-first Amendment's grant of authority . . . that it is exempted from the effect of the dormant commerce clause." *Id.* at 231 (citing *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Twenty-first Amendment. *See e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 50 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate intoxicating liquor even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority and that the Twenty-first Amendment insulates that authority from a dormant Commerce Clause challenge.[7]

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[7] This Court refused to adopt a constitutional analysis which inquires into the underlying purposes of a state statute and determines whether regulatory or protectionist aims predominate. *See, Indianapolis Brewing Co. v. Liquor Control Commission*, 305 US 391 (1939); *Finch v. McKittrick*, 305 U.S. 395 (1939). These cases were challenges to retaliatory (or "protective", as Justice Brandeis suggested they might be termed) statutes limiting or banning importation of alcoholic beverages from states which themselves, in the eyes of the "protective" state, discriminated against or burdened importations. The burdens cited varied from excise tax differentials, to import fees, to requirements that importers sell only to in-state licensed wholesalers.

The Court might have rejected all such legislation or permitted it only when imposed against protectionist rather than regulatory statutes, but either choice would have compelled the Court to evaluate the statute being

The Court, however, did not declare state regulation of intoxicating liquor free from all limitations. Justice Brandeis wrote in *Young's Market*: "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." 299 US 59, 64 (1936). The Court subsequently articulated such limitations. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) (Equal Protection Clause); *See Constantineau v. Wisconsin*, 400 U.S. 433 (1971) (Due Process Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 941 (1982) (Establishment Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (First Amendment). No constitutional provision, other than the Twenty-first Amendment, is at issue in this case.[8]

Similarly, the Court has made it clear that states may not attempt to regulate commercial activity extraterritorially. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (an affirmation statute that controlled the price of intoxicating liquor in other states);

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retaliated against. If the Court rejected retaliation, but did not evaluate the statute which provoked the prohibited response, there would be neither a political nor a judicial remedy against allegedly protectionist legislation. Instead, the Court chose to permit protective statutes, and avoid judicial intrusiveness into the myriad details of complex state regulatory systems.

The Court left trade disputes involving intoxicating liquors to be resolved through the political process. By the end of the 1930's, states, generally speaking, were no longer enacting protectionist laws regarding intoxicating liquor. Joseph Kallenbach, "Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment," 14 Temple L.Q. 474, 488 (1940). The problem did not disappear, but, like alcohol abuse, it was controlled.

[8] Dormant Commerce Clause analysis is not relevant because of the passage of the Twenty-first Amendment and congressional enactment of the Webb-Kenyon Act.

Healy v. Beer Inst., Inc.., 491 U.S. 324 (1989) (striking down a price affirmation statute with extraterritorial effect);[9] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating New York's attempt to close down an airport duty free shop, whose products were delivered to the ultimate consumer and whose products were used abroad). Again, no claim is being made here that Michigan is attempting to regulate extraterritorially.

Only once has this Court applied dormant Commerce Clause analysis to a regulation arguably involving the importation of alcoholic beverages. In *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984), Hawaii imposed a tax on intoxicating liquors but exempted from taxation two locally produced products, ti root brandy and pineapple wine. The court struck down the Hawaii tax on the basis that it was intended to "favor local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization." *Id.* at 276. However, the exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local

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[9] Justice Scalia, concurring in *Healy*, stated that the statute's "discriminating character eliminates the immunity afforded by the Twenty-first Amendment. *Id.* at 344. Importantly, he did not find that any difference between the treatment of imports and the treatment of in-state products was unconstitutionally protectionist and unprotected by the Twenty-first Amendment. "*Every* use of §2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Connecticut did not treat out-of-state suppliers differently from in-state suppliers. It distinguished brewers, whether located in or out-of-state, who sold only in Connecticut, from those, whether located in or out of state, who sold both in Connecticut and in neighboring states. Justice Scalia objected to differential treatment of interstate commerce, not differential treatment of importation. *Healy v. Beer Dist.*, 491 U.S. 324, 344 (1988).

industry. The Court stated that "[t]he central purpose of [Section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition" at *Id.* Hawaii insisted that it had no other purpose than a subsidy for the exemption. Official Transcript Proceedings before the Supreme Court of the United States. January 11, 1984, p. 35. Significantly, the relevance of the Webb-Kenyon Act was never argued to the Court. Furthermore, the Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing for the majority, Justice White found this 'belated" argument unconvincing.[10]

The Court remanded the case for a determination of remedy. Reimbursement, if ordered, would function like a fine. It would not disable Hawaii's future capacity to regulate the importation, distribution, and sale of intoxicating liquors.[11]

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[10] Three current members of the Court sat on the *Bacchus* case and all dissented on the basis that the "commerce clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution." *Bacchus v. Dias*, 468 U.S. 263, 278 (1894) (J. Stevens with J. Rehnquist and J. O'Connor dissenting). In recognition of the fact that hard cases make bad law, *Bacchus* should at the least be confined to its unique facts and procedural history. At best, the case represents the Court's acknowledgement that there was not even a colorable attempt by the state of Hawaii to justify the exemption on any grounds other than naked economic protectionism nor was there any attempt below to even argue the Twenty-first Amendment. Alternatively, the case stands for the proposition that it is constitutionally impermissible to distinguish between in-state and out-of-state suppliers for the sole purpose of raising revenue, intentionally creating the functional equivalent of a tariff, but constitutionally permissible when a purpose is to control importation and transportation when the intoxicating liquor is destined for delivery or use within the state.

[11] The author of the dissent in *Bacchus* later lamented, dissenting in *City of Newport v. Iacabucci*, 479 U.S. 92, 98 (1986): "In recent years, however, the Court has completely distorted the Twenty-first Amend-

Unfortunately, even if it was not wrongly decided, *Bacchus* has been misinterpreted by lower courts and cited for the proposition that it represents a pendulum swing by the Court from a broad to a narrow reading of the Twenty-first Amendment. *See, e.g., Heald v. Engler*, 342 F.3d 517, 523-24 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F. 3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F. 3d 1004, 1108 (11th Cir. 2002). That faulty reading has led those lower courts to apply traditional dormant Commerce Clause analysis incorrectly to state regulations governing the importation, sale and distribution of intoxicating liquors.[12]

For reasons discussed above, however, *Bacchus* can *not* be read so broadly and does *not* stand for the proportion that the Court had embraced a sea change in the interpretation of the

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ment. It now has a barely discernible effect in Commerce Clause cases . . ." J. Stevens supported his conclusion by citation to *Healy* and to *Bacchus*, which did not have such a devastating effect. Justice Stevens' gloomy assessment was perhaps colored by his disapproval of the path taken by this Court in *California v. Larue*, 409 U.S. 109 (1973) and continued in *City of Newport*. The path, of course, was decisively rejected in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

[12] The *Heald, Dickerson, Beskind* and *Bainbridge* courts employed the traditional two step dormant Commerce Clause analysis. First, the courts examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are incommensurate with putative local gains." *Swedenburg v. Kelly*, 358 F.3d 223, 230 (2d Cir. 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2004)). Second, concluding that the regulation in question failed to pass muster, the courts examined whether the regulation in question implicated one of the Twenty-first Amendment's "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decision of this Court. *Swedenburg*, at 231.

Twenty-first Amendment. *Bacchus* presents an unusual set of facts. The state insisted that its exclusive intent was to favor its own products in exempting them from an excise tax. This case simply did not implicate the state's interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in this case provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of intoxicating liquor. Furthermore, as noted by the *Swedenburg* and *Bridenbaugh* courts, nothing in that case mandated dormant Commerce Clause or "core power" analysis when considering challenges to state importation regulation or to requirements that intoxicating liquors be distributed through in-state licensed entities. *See Swedenburg v. Kelly*, 358 F.3d 223, 236 (2d Cir. 2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851-54 (7th Cir. 2000), *cert. denied sub. nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

This Court consistently has reaffirmed the right of states under the Twenty-first Amendment to control the importation of intoxicating liquor. In *North Dakota v. United States*, 495 U.S. 423 (1990), the court upheld labeling and reporting requirements for intoxicating liquor shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is

unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994); and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936))[13].

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[13] The Sixth Circuit dismissed as dictum the relevance of the language in *North Dakota*, describing state importation controls as being unquestionably legitimate, because the case involved a Supremacy Clause challenge. The *Heald* Court, however, failed to appreciate the basis for the *North Dakota* decision and the implications of that decision on a dormant Commerce Clause challenge to state importation controls.

The plurality concluded that there was no discrimination because the United States could, like all other retailers in North Dakota, purchase its imported intoxicating liquor from in-state licensed wholesalers. This conclusion presupposes that all other retailers were compelled to so purchase from in-state licensed wholesalers. If a retailer could buy directly from an out-of-state supplier, the terms of the transaction might be better than those available to the United States from the in-state wholesaler, thus making discrimination possible. Justice Scalia reached a similar result because he believed that the state, under the Twenty-first Amendment, could compel the United States, as well as all other retailers, to purchase intoxicating liquors only from licensed in-state wholesalers.

More recently, this Court has again recognized the states' power to control importation of intoxicating liquors. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.484 (1996), this Court held that the Twenty First Amendment gave no authority to states to violate the First Amendment. The advertising restriction at issue was rejected because there was no evidence that it significantly advanced the state interest in temperance and because there were less restrictive alternatives available. These less restrictive alternatives were direct regulation of prices or taxation, as conceded by the state's own expert. Justice Stevens, joined by Justices Kennedy, Souter and Ginsburg at 1509 and Justice O'Connor joined by Chief Justice Rehnquist and Justices Souter and Breyer at 1521. The principal opinion, by Justice Stevens, also referred to the possibility of direct limitation of per capita purchases. None of these alternatives can be effectively implemented in the absence of a requirement that all intoxicating liquors sold or delivered for use within the state go through an in-state licensed entity.

IV. THE STATE'S REGULATORY STRUCTURE THAT PERMITS IN-STATE WINERIES TO SHIP ALCOHOL DIRECTLY TO CONSUMERS BUT RESTRICTS OUT-OF-STATE WINERIES IS PERMISSIBLE UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT.

Currently, there is a split among six Circuit Courts of Appeal regarding the central question presented on this appeal. Three circuits have invalidated state laws that prohibit out-of-state wineries (which are *not* subject to the regulatory reach of the state) to ship direct to consumers but permit in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). These three circuits, as well as the Eleventh Circuit, utilized traditional dormant Commerce Clause analysis in reaching their decisions.[14] In doing so, they ignored or misinterpreted

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[14] In *Heald* and *Dickerson*, the Sixth and Fifth Circuits respectively struck down the direct shipping prohibition in its entirety. *Heald*, at 527; *Dickerson*, at 409-410. In *Beskind*, the Fourth Circuit struck down only the in-state exemption and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *Beskind*, at 519. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit vacated a summary judgment for the state and remanded on the issue of whether Florida's statutory scheme was closely related to the "core concern" of the Twenty-first Amendment of raising revenue or was a pretext for mere economic protectionism. *Bainbridge*, at 1104. The Eleventh Circuit made clear, however, that the standard to be met was far less than the least restrictive alternative. In dissent, Judge Roney stated: "In these credit card days of easy purchase by telephone and internet, this statute reflects the 'core' concerns of the Twenty-first Amendment that alcoholic beverages not be sold to underage consumers and not be sold effectively unregulated or untaxed. This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage

the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Two Circuits have upheld the differential treatment between in-state and out-of-state wineries noting that it was "a permissible expression of the state's authority under Section 2 of the Twenty-first Amendment." *Swedenburg v. Kelly*, 358 F.3d 223,231 (2d Cir.2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert denied, sub. nom., Bridenbaugh v.* Carter, 532 U.S. 1002 (2001). Both the *Swedenburg* and *Bridenbaugh* courts rejected the contention that the express language of the Twenty-first Amendment was subordinate to the doctrine of the dormant Commerce Clause. *Swedenburg*, at 231; *Bridenbaugh*, at 849 ("This case pits the Twenty-first Amendment, which appears in the Constitution, against the 'dormant commerce clause', which does not"). They also rejected the argument that the Twenty-first Amendment only protects state regulation "that advance so-called core concerns." *Swedenburg*, at 233; *Bridenbaugh*, at 851. Accordingly, the *Swedenburg* and *Bainbridge* courts rejected as "flawed" the two-step approach embodied in traditional dormant Commerce Clause analysis that was applied by the other four circuits. *Swedenburg*, at 231; *Bridenbaugh*, at 853.

In a thoughtful and historically grounded analysis, the *Swedenburg* court upheld New York laws, which regulated the importation of intoxicating liquors by requiring that they pass through an in-state licensee. The *Swedenburg* court

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license to an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state." *Id.* at 1116.

noted that "[w]ith Prohibition's repeal, the drafters of the Twenty-first Amendment drafted Section 2 to allow states the authority to circumvent dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol." *Swedenburg*, at 237.

In reaching this conclusion, the *Swedenburg* court specifically recognized the importance of the requirement that all imported intoxicating liquors be delivered to an in-state licensee, thereby assuring effective regulation. This regulatory concern is unquestionably valid.

> Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

Swedenburg, at 237-238.

In contrast, the *Heald* and *Dickerson* decisions threaten to dismantle complex state regulatory systems governing intoxicating liquors that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, reducing abuse of intoxicating liquors, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, collecting taxes, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

The *Heald* decision substantially undermines the effectiveness of Michigan's regulatory regime by proscribing the power to control importation. In Michigan, state law requires

that all intoxicating liquor must either be produced in-state by a licensed entity or be produced out-of-state and shipped in-state to a licensed entity. Either way, the source of the intoxicating liquor to be consumed in Michigan falls under the licensing and enforcement umbrella of the State. If that intoxicating liquor is produced, imported or sold in a manner inconsistent with state law, Michigan has created a transparent and accountable distribution system so that any such violation can be ascertained, punished, and deterred in the future. None of these regulatory functions can be effectively exercised over an unlicensed out-of-state entity. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit invalidated this regulatory regime because in-state wineries (which are licensed and subject to effective control by the state) may sell, under certain circumstances, direct to consumers while out-of-state wineries (which are *not* licensed and *not* subject to effective control by the state) must first sell to a licensed importer.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to police underage sales effectively when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brewpubs, since in-state suppliers are permitted to sell on-premise?

The logic of the opinions would seem to apply to importation controls that result in any difference in the regulatory treatment of an out-of-state or an in-state licensed supplier, of an out-of-state or in-state licensed wholesaler, or of an out-of-state or in-state licensed retailer, even where the purpose of that importation control is to ensure compliance

with state law by requiring that all importation be to a licensed entity physically present within the state. The licensed, physical presence of the source of the intoxicating liquor, be it manufacturer, importer, or wholesaler, is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system. The validity of such a system has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of state suppliers.

In summary, Amicus Curiae NBWA urges the Court to reverse the *Heald* decision and affirm the *Swedenburg* decision. The history of the Twenty-first Amendment and a careful analysis of the Court's jurisprudence thereunder makes it clear that "a state is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *See, Department of Revenue v. James B. Bean Distilling Co.,* 377 U.S. 341, 344 (1964) (holding that the Twenty-first Amendment does not grant states the power to intrude upon the federal interest in regulating the importation of foreign intoxicating liquor).

Simply put, the Twenty-first Amendment grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110 (1980). If no other constitutional provisions are at issue, and if the state is

not seeking to regulate intoxicating liquors extraterritorially (neither of which is at issue here), the state is at liberty to regulate intoxicating liquors free from dormant Commerce Clause limitations. As such, Michigan, as a proper exercise of its regulatory function, should certainly be able to condition a winery's ability to ship direct to consumers upon the receipt of a license and upon the establishment of a physical presence in the state. In practical terms, these requirements are essential to effective enforcement.

V. THE *HEALD* DECISION DESTROYS THE KEYSTONE OF THE STATE'S REGULATORY POWER: THE RIGHT UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF INTOXICATING LIQUOR INTO THE STATE.

The disposition of this case requires an understanding of the underlying theory and history of alcohol regulation, the complexity and efficacy of the state's current regulatory structure, and the consequences of the lower court's ruling on Michigan's legitimate goals of preventing illegal sales to minors, reducing abuse of intoxicating liquor, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, and collecting taxes. Consideration of these compelling concerns leads to but one conclusion: that the current regulatory system has worked remarkably well for over seventy (70) years and should not be discarded.

Following Prohibition, states generally followed one of two models in enacting intoxicating liquor regulations. A minority of states adopted some form of public monopoly. *See* George A. Shipman, *State Administrative Machinery for Liquor Control*, 7 Law & Contemp. Prob. 600, 612 (1940). While this model vested the most control in the state, it also involved the displacement of private operation by public operation. A majority of states elected to adopt a three-tier

system of distribution in their alcoholic beverage industry, preserving that degree of entrepreneurial autonomy that was consistent with comprehensive regulation.

To avoid the harmful effects of vertical integration in the alcohol industry, the three-tier system effectively restricts manufacturers, wholesalers, and retailers to one level of activity. Prior to Prohibition, large companies often controlled, through vertical and horizontal integration, both the production and sale of intoxicating liquors. The resulting "tied-houses" led to excessive retail capacity and cutthroat competition for market share, which, in turn, led to intemperate consumption as a consequence of excessive sales stimulation. The three-tier system eliminates the probability of "tied house" relationships or vertical integration. It also prevents companies with monopolistic tendencies from dominating all levels of the industry and assures that the source of distribution will have a licensed in-state presence. The three-tier system thus creates a transparent and accountable distribution system in the industry.

While each state has implanted its unique imprint on its three-tier system over the last seventy (70) years, the utility and effectiveness of the three-tier model has been well demonstrated. Before and during National Prohibition, abuse of intoxicating liquors was an acute problem. Since Repeal, it has been at worst a chronic one. The three-tier system has worked remarkably well and withstood the test of time. Furthermore, the need for and current relevance of the three-tier system is perhaps greater today than at any time in recent history. Public concern with both intemperate and underage consumption is obvious. The intoxicating liquor industry has experienced unprecedented consolidation in recent years, which makes vertical integration, with the attendant "tied house" evils, far more likely without appropriate controls. Such developments highlight the need for greater control of the productive and distributive channels of intoxicants, <u>not</u>

deregulation, and the need to protect state enforcement powers in order to curb excessive sales, abusive sales practices and intemperate consumption.

Article Four of Michigan's Constitution provides that "the legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sale thereof." Const. 1963, Act. 4, § 40. In accordance with the explicit power granted by the Twenty-first Amendment of the United States Constitution and Article Four of the Michigan Constitution, the Michigan Liquor Control Commission adopted a three-tier system. Generally speaking, the system requires consumers to purchase and receive intoxicating liquors from licensed in-state retailers; retailers to purchase and receive intoxicating liquors from licensed wholesalers; and wholesalers to purchase and receive intoxicating liquors from licensed manufacturers. Mich. Comp. Laws § 436.1203.

Michigan permits an exception to the direct shipping prohibition for licensed wineries with an in-state presence. These wineries (which are subject to the state's enforcement powers) may ship direct to consumers provided that they comply with all of the state's liquor laws. Mich. Comp. Laws § 436.113 (a) & 436.1203 (1)—(8). There is no similar exception for wineries, which do not have an in-state presence (and which are therefore not subject to the state's enforcement powers).

Michigan's different treatment of wineries with an in-state presence from those without such a presence clearly does not violate the United States Constitution. Control of importation is the essential component of the state's licensing and regulatory authority and the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from a charge of "discriminatory" treatment.

The *Heald* decision eliminated this fundamental element of Michigan's "comprehensive system for the distribution of liquor within its borders." *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994) and *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)). Furthermore, the *Heald* court's broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation.

In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the United States Court of Appeals for the Fourth Circuit incorrectly applied dormant Commerce Clause analysis but did recognize and protect the integrity and efficacy of the North Carolina regulatory system. In *Beskind*, out-of-state wineries challenged, under the Commerce Clause, North Carolina's prohibition on the direct sale of wine to North Carolina residents by out-of-state wineries. The trial court in *Beskind* agreed with the out-of-state wineries that North Carolina's laws prohibiting direct wine sales by out-of-state wineries violated the Commerce Clause because North Carolina permitted in-state wineries to sell directly to consumers. At the request of the out-of-state wineries, the trial court enjoined North Carolina from enforcing its laws prohibiting direct sales of wine to North Carolina residents by out-of-state wineries.

On appeal, North Carolina argued that the trial court's remedy was inappropriate and that it should be permitted to cure the discrimination against out-of-state wineries by prohibiting in-state wineries from selling wine directly to consumers, thus preserving the comprehensive regulatory system. The Fourth Circuit agreed, specifically noting that the North Carolina three-tier system "furthers its Twenty-first Amendment interests in regulating the consumption of alcoholic beverages, enforcing a minimum age for the pur-

chase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution." *Id.* at 516.

In refusing to effectively dismantle this system, the Court further stated that:

> Additionally, North Carolina has maintained its ABC laws in implementation of the Twenty-first Amendment since 1937, shortly after the end of Prohibition, but only added the preference for local wineries over 40 years later, perhaps to promote its local wine industry but certainly not to relinquish its power under the Twenty-first Amendment. And even as it added that preference for local wineries, it did not exempt them from a substantial portion of the ABC laws. Moreover, it did not retreat from its general mandate that the ABC laws be "liberally construed to prohibit the transportation and importation of alcoholic beverages except as permitted by those laws.

Id. at 519.

Although the *Beskind* Court erred in its analysis of the Twenty-first Amendment, and an in-depth discussion of remedy is beyond the purview of this appeal, the *Beskind* case is important for its recognition that a narrow exemption contained in a state statute should not jeopardize an entire complex regulatory system that has worked remarkably well for over seventy (70) years.

CONCLUSION

Based on the arguments and authorities set forth above, Amicus Curiae National Beer Wholesalers respectfully requests that this Court reverse the holding of the United States Court of Appeals for the Sixth Circuit in *Heald v.*

Engler, 342 F.3d 517 (6th Cir. 2003) and affirm the holding of the United States Court of Appeals for the Second Circuit in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004).

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